Supreme Court
(1)
'001042 DEC 18 2000
OFFICE OF THE CLERK

No. 99-3443

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

MARTIN H. TONN,
PETITIONER, PRO-SE

V.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARTIN H. TONN
PETITIONER, PRO-SE
50365 121st ST.
AMBOY, MN. 56010
PHONE # 507-674-3698

34 pp

QUESTIONS PRESENTED

1. Is Tonn the taxpayer or a "person other than the taxpayer" in this case since Independent Energy Enterprises, Inc. (IEEI) was the Taxpayer against which the IRS brought its action for unpaid withholdings?

2. Since Tonn is a "person other than the taxpayer", does the District Court have "Subject Matter Jurisdiction" under the provisions of Title 26, Section 7426 USCA in this case?

3. Since the District Court has "Subject Matter Jurisdiction", how can the Court claim that the Doctrine of res judicata applies in this case since the question of whether Tonn is the taxpayer or a "person other than the taxpayer" has not been heard, discussed or litigated in this case?

4. Since Tonn has been erroneously characterized as the "Taxpayer" by the court, how is it possible for the Court to deny Tonn's claim on the basis of res judicata?

TABLE OF CONTENTS

Page (s)

QUESTIONS PRESENTED ---------- i

TABLE OF CONTENTS ---------- ii

TABLE OF AUTHORITIES ---------- iii

PETITION ---------- 1

OPINIONS BELOW ---------- 2

JURISDICTION ---------- 2

CONSTITUTIONAL WAIVER

OF SOVEREIGN IMMUNITY ---------- 2

STATUTORIAL WAIVER ---------- 2-3

STATEMENT ---------- 4-6

REASON FOR GRANTING THE PETITION ---- 7-8

THE QUESTION PRESENTED IS IMPORTANT - 9

CONCLUSION ---------- 10

APPENDIX

Per Curiam Opinion ---------- A-1 - A-4
Denial of Petition of Rehearing --- A-5
Memorandum Opinion and Order -- A-6 - A-15
Section 7426 of Title 26 USCA --- A-16 - A-19

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONAL AUTHORITY

The "Takings" Clause of the Fifth Amendment ---------- 2, 5-6

STATUTORIAL AUTHORITY

Section 7426 of Title 26 USCA ---------- 2-3, 5-8

Section 6335 of Title 26 USCA ---------- 4-5

Section 1254 (1) of Title 28 USCA -------- 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

Martin H. Tonn
Petitioner, Pro Se

v.

United States of America
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Martin H. Tonn, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The PER CURIAM opinion of the United States Court of Appeals for the Eighth Circuit Filed: April 4, 2000. The United States Court of Appeals for the Eighth Circuit DENIAL FOR REHEARING filed: July 21, 2000. The United States District Court of Minnesota Third Division Civil No. 99-275 MEMORANDUM OPINION AND ORDER Dated: June 28, 2000.

JURISDICTION

The court of appeals entered its judgement on April 4, 2000. The jurisdiction of this court Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL WAIVER OF SOVEREIGN IMMUNITY

The Takings Clause of the Fifth Amendment states,"no person shall be...deprived of life, liberty, or property, without due process of law;....

STATUTORIAL WAIVER: The statutorial requirement for waiver of sovereign immunity is provided by the provisions of the judicial proceedings Title 26 of USCA Section 7426.

"Section 7426. Civil actions by persons other than taxpayer. [IEEI, not Tonn, is taxpayer in this action. (emphasis added.)]

(a) Actions Permitted.-

(1) Wrongful levy. - If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a District Court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(b) Adjudication - The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:...

(2) Recovery of property. - If the court determines that such property has been wrongfully levied upon, the court may-...

(C) if such property was sold, grant a judgment for an amount not exceeding the greater of-...

(ii) the fair market value of such property immediately before the levy."

STATEMENT

At the inception of this case, the IRS was involved in a campaign to eliminate limited partnerships, describing them to be "abusive tax shelters". The government agents set out to destroy the limited partnerships formed by Tonn. The actions of the agents, making false and derogatory statements to Tonn's associates, destroyed Tonn's credibility. As a result, investors withheld payments causing unpaid withholdings forcing the Corporation to file for Chapter 11 bankruptcy protection. The IRS was granted dismissal of the Chapter 11 in March of 1987. The IRS and the bank, by fraudulent concealment, deprived Tonn and IEEI of all property and business. The IRS illegally seized all of IEEI's assets and made a private treaty in violation of Section 6335 of Title 26 USCA, a breach of the required ten day waiting period before posting sale after seizure and IRS violation of public sale requirements. In addition the IRS did not provide the sum demanded or specify an account of the property seized as required by Section 6335. The IRS then discharged the levy in exchange for a payment of $22,500.00 from the bank, and by fraudulent concealment, created a situation enabling the bank to coerce the

principals of IEEI to sell the assets of IEEI to the bank.

On May 20, 1987, **two months after the illegal seizure,** Tonn received the IRS audit report which challenged the valuation of the property purchased by the partnerships. This IRS report was proven false by independent appraisals and the U.S. Bureau of Standards. The report also revealed inappropriate methodology in the form of evidence fabricated by the IRS. All efforts to discuss this were dismissed by the IRS as "self-serving". For six years after the seizure, the Partnerships and Tonn were not permitted an occasion by the IRS to defend against the erroneous allegations of the IRS. Only by the persistence and intercession by U.S. Senator Wellstone, was Tonn granted a hearing with the IRS Regional Office of Appeals, which resulted in **Tonn's total exoneration.** Abatement of all penalties and interest by the IRS did not grant Tonn relief for damages caused by the illegal IRS seizure on March 27, 1987 in violation of Title 26 Section 6335 USCA. Tonn makes a claim under the "Takings Clause" of the Fifth Amendment and Title 26 Section 7426 of the IRS Code.

By invoking the doctrine of res judicata, the court is clearly in error reaching the legal conclusion that Tonn is the Taxpayer.

IEEI is the taxpayer against which the IRS brought its action for unpaid withholdings and not Tonn, who is **"a person other than the Taxpayer"**.

After the IRS's seizure, Mr. Draeger lost his job as Chief Executive Officer and was forced to move. The IRS informed him they would be seizing his home and life savings to pay for the withholdings of IEEI and penalties. Arden Draeger suffered a massive heart attack and died the day before he was to appear at an IRS collection hearing. The stress of the wrongful, illegal and unconstitutional IRS actions contributed to his death at the age of 51 years.

Tonn demands judgment against the defendant under the Takings Clause of the Fifth Amendment and the provisions of title 26 section 7426 USCA:

1- Damages in the amount of $21,000,000.00

2- For actual costs by Tonn for pursuing this action with reasonable fees.

3- Such other relief the court deems just.

REASONS FOR GRANTING THE PETITION

1. The Eighth Circuit Court of Appeals is in gross error by failing to recognize that Tonn's complaint alleges a constitutional claim and a statutorial claim for damages clearly distinguishable from that of a tax assessment and collection activity. The wrong of which Tonn has complained is that the IRS, by various manner and means including fraudulant concealment, prevented Tonn from presenting a detailed and timely defense to false accusations and erroneous issues raised by the IRS, which culminated in an illegal IRS seizure causing the loss of Tonn's property and business. By permitting this injustice to prevail Tonn is prevented from continuing with his alternative energy business so badly needed by our country today as is manifestly expressed by the shortage of electricity in California today.

2. By erroneously characterizing Tonn as the Taxpayer instead of a "person other than the taxpayer", the District Court and the Eighth Circuit Court of Appeals in its affirmation of the District Court's opinion, are in gross error. **Neither the District Court nor the Eighth Circuit make any mention of Section 7426 of Title 26** which refers to civil actions by "persons other

than taxpayers" as briefed extensively by the Plaintiff. Section 7426 of Title 26 USCA clearly and unequivocally provides a "waiver of sovereign immunity" and "subject matter jurisdiction" for the courts to hear this case. This court needs to address this gross injustice in order to prevent further harm to Tonn's person and finances.

3. In the interest of elemental justice this mischaracterization of Tonn as the taxpayer must be remedied by the court. The governmental philosophy that the law gives IRS employees have the right and duty to abuse private citizens by any means possible because of their sovereign immunity must be corrected.

THE QUESTIONS PRESENTED ARE IMPORTANT

The District Court opinion and the Circuit Court's wrongful affirmation that Tonn is the Taxpayer rather than "a person other than the Taxpayer", if allowed to stand will continue to place an unbearable financial burden on Tonn. It is a gross injustice that citizens should be permitted to be abused in this manner when Tonn was doing exactly what the government had asked and risked his entire net worth during the Mid-east oil crisis of the late 1970's to establish an alternative energy industry.

The questions as presented are important in that they illustrate that the Courts in this case have taken the liberty to disregard the clear and unequivocal language of Section 7426, The Takings Clause of the Fifth Amendment of the U.S. Constitution and the facts as presented. In the place of the law, constitutional rights and undisputed facts the courts have wrongfully substituted the doctrine of res judicata to deprive the citizen of relief without remedy for wrongful, illegal, unconstitutional and egregious acts of government employees. This court has the obligation to U.S. citizens to remedy this situation or to provide alternative

methods for citizens to seek redress for these wrongs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

dated 12/15/2000

Martin H. Tonn
Petitioner, Pro Se
50365 121st St.
Amboy, MN. 56010
Phone # (507) 674-3698

APPENDIX

Per Curiam Opinion Of The

U.S. Court Of Appeals

For The Eighth Circuit

Filed April 4, 2000

Pages A-1 - A-4

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-3443

Martin H. Tonn,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

(Not to be published)

Submitted: March 28, 2000

Filed: April 4, 2000

Before RICHARD S. ARNOLD, BOWMAN, AND BEAM, Circuit Judges.

PER CURIAM.

Martin H. Tonn appeals the District Court's (The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota) dismissal of his complaint without prejudice for lack of subject matter jurisdiction. We affirm.

Asserting numerous jurisdictional bases, Tonn commenced this action for damages against the United States. Tonn alleged that certain Internal Revenue Service (IRS) employees committed fraud, made misrepresentations, and maliciously persecuted him while collecting the federal withholding taxes of Interstate Energy Enterprises, Inc. (IEEI), a corporation in which Tonn was a shareholder; that they violated his due process rights; and that their collection efforts against IEEI contributed to the death of his friend. Tonn had previously filed three similar actions, the last of which was Tonn v. United States. Civ. No. 97-1132 (D. Minn. Sept. 10, 1998) (Tonn III). The allegations and asserted jurisdictional bases were the same in Tonn III as in this case, except that here he cited 28 U.S.C. §1346(a)(1) rather than section 1346 (b). The District Court dismissed the complaint in Tonn III, without prejudice, for lack of subject matter jurisdiction because the United States had not waived sovereign immunity as to Tonn's claims; Tonn did not appeal. The District Court in this case determined that the prior dismissal had res judicata effect on the issue of jurisdiction.

We review de novo a dismissal on res judicata grounds. See

NAACP v. Metropolitan Council, 125 F. 3d 1171, 1174 (8th Cir.1997), vacated on other grounds, 118 S. Ct. 1162, and reinstated, 144 F. 3d 1168, cert. denied, 119 S. Ct. 73 (1998). As to the identical asserted bases for jurisdiction, we conclude the District Court properly determined that res judicata barred this action. See Durfee vs. Duke, 375 U.S. 106, 113 (1963) (res judicata principles apply to questions of personal and subject matter jurisdiction as well as to other issues). With respect to section 1346(a)(1), which provides for civil actions to recover taxes erroneously or illegally assessed or collected, a prerequisite to the filing of a refund action is the timely filing with the IRS of an administrative claim for refund within the period of limitations for filing a claim. See 26 U.S.C. § 7422(a) ("No [refund] suit shall be maintained.... until a claim for refund... has been duly filed by the [IRS]."); Chemin v. United States, 686 F. 2d 1320, 1325 n.8 (8th Cir. 1982) (only taxpayer from whom tax was allegedly wrongfully collected has standing under § 1346(a)(1)), cert. denied, 459 U.S. 1147 (1983). Therefore, we conclude that section 1346(a)(1) did not confer on the District Court subject matter jurisdiction over this action.

Accordingly, we affirm.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX

Denial of Petition For Rehearing

by U.S. Court of Appeals

For the Eighth Circuit

Filed July 21, 2000

Page A-5

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-3443MNST

Martin H. Tonn,	*	
Appellant,	*	Appeal from the United
vs.	*	District Court for the
United States of America	*	District of Minnesota
Appellee	*	

The petition for rehearing by the panel filed by appellant is denied.

(5193-010199)

July 21, 2000

Order Entered at the Direction of the Court
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX

Memorandum Opinion And Order

Civil No. 99-275/RHK/JMM

U.S. District Court

District of Minnesota

Filed June 28, 1999

Pages A-6 - A-15

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Martin H. Tonn,

Plaintiff,

vs.

Civ. No. 99-275/RHK/JMM
MEMORANDUM OPINON AND ORDER

United States of America,

Defendant,

Martin H. Tonn, pro se, Amboy, Minnesota, for Plaintiff.

Carl J. Tierney, Tax Division, United States Department of Justice, Washington, D.C., for Defendant.

Introduction

Plaintiff Martin H. Tonn ("Tonn") was involved in several limited partnerships and two corporations, each of which was in the business of developing alternative energy equipment. (Tonn Aff. ¶¶ 11-17.) In March 1987, the IRS seized the assets of one of the corporations in which Tonn was involved, Independent Energy

Enterprises, Inc. ("IEEI"), as well as the limited partnerships, for unpaid federal withholding taxes. (Id. ¶ 60.) In an attempt to recover the seized assets, Tonn filed a lawsuit in this Court in 1993, which was dismissed without prejudice. See Tonn v. United States ("Tonn I"), 847 F. Supp. 711 (D. Minn. 1993) (Kyle, J.), aff'd, 27 F.3d 1356 (8th Cir. 1994). Tonn filed subsequent actions in 1995 and 1997, both of which were also dismissed without prejudice. See Tonn v. United States ("Tonn II"), Civ. No. 3-95-1168, 1996 WL 511700 (D. Minn. June 3, 1996) (Kyle, J.), aff'd, 108 F.3d 1382 (8th Cir. 1997); Tonn v United States ("Tonn III"), Civ. No. 97-1132 (D. Minn. Sept. 10, 1998) (Davis, J.). Tonn has now initiated a fourth action before this Court, arising from the same set of facts. Currently before the Court is the Defendant's Motion to Dismiss or, in the Alternative for Summary Judgment, in which it argues that Tonn's latest Complaint is barred by the doctrine of res judicata. Also before the Court is Tonn's Motion for Summary Judgment. For the reasons set forth below, the Court will grant the Defendant's Motion to Dismiss and will deny Tonn's Motion for

Summary Judgment.

Background

The factual and procedural history of this case has been extensively set forth and discussed in the previous Orders issued by this Court. See Tonn I, 847 F. Supp. at 712-15; Tonn II, 1996 WL 511700, at *1; Tonn III, Civ. No. 97-1132, at *1-*2. In his Complaint in the instant case, Tonn has brought claims against the Defendant for a violation of the Takings Clause of the Fifth Amendment, a violation of his due process rights, fraudulent concealment, and the wrongful death of his friend, Arden Draeger. (See Compl., ¶¶ 19-32.)

In his first action, Tonn I, Tonn's Complaint was dismissed without prejudice. With regard to his tort claims, the Court found that Tonn had failed to exhaust his administrative remedies. With regard to his due process claims, the Court concluded that Congress had already provided taxpayers sufficient alternative avenues of redress for misconduct by IRS employees and, therefore, a taxpayer was not entitled to bring a Bivens claim, as

Tonn was attempting to do. See Tonn I, 847 F. Supp. at 715-18. The Court dismissed Tonn's Complaint without prejudice, and the Eighth Circuit affirmed. See Tonn I, 27 F.3d at 1356-57.

In Tonn II, Tonn filed a Complaint that was substantively identical to that in Tonn I, with the two exceptions that he did not name any individual defendants and that he added a claim for malicious prosecution. See Tonn II, 1996 WL 511700, at *1. The Court dismissed his Complaint in its entirety without prejudice, concluding that each of Tonn's claims was barred by the doctrine of sovereign immunity, and that his Bivens claim was also barred by the rule that such claim may not be maintained directly against the United States. See Tonn II, 1996 WL 511700, at *1-*2. The Eighth Circuit again affirmed the dismissal of Tonn's claims. See Tonn II, 108 F.3d at 1382.

In Tonn III, Tonn filed another complaint arising from the IRS's seizure of assets in 1987. In his Complaint, Tonn re-alleged his claims from Tonn II and added claims for violation of the Internal Revenue Code, collusion, and for the wrongful death of his

friend. See Tonn III, Civ. No. 97-1132, at *1. Again, the court concluded that each of Tonn's claims was barred by the doctrine of sovereign immunity, and that the provision of the Internal Revenue Code cited by Tonn did not create any cause of action for violation of the Code's procedures. See id, at *3-*5. All claims in Tonn's Complaint were again dismissed without prejudice. See id, at *6. Tonn's subsequent Motion for Reconsideration was denied. See October 20, 1998 Order, Civ. No. 97-1132 (attached as Ex. F to Tierney Decl.). Tonn did not appeal the court's dismissal of his claims in Tonn III.

Analysis

I. Standard of Review

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must take as true the allegations contained in the complaint. Cooper v. Pate, 378 U.S. 546, 546, 84 S. Ct. 1733, 1733 (1964) (per curium). A complaint

> must be viewed in the light of the most favorable to the plaintiff and should not be dismissed merely because the

> court doubts that a plaintiff will be able to prove all of the necessary factual allegations. "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."

Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982) (quoting Jackson Sawmill Co. v. United States, 580 F.2d 302, 306 (8th Cir. 1978)). Viewing the complaint in this manner, the Court may dismiss a case under Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct.99, 101-02 (1957)).

The Court must interpret pro se allegations in a liberal manner. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596 (1972). Federal courts have discretion, however, to dismiss a pro se complaint if it fails to set forth specific facts supporting a legally cognizable claim. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985); see also Nietzke v. Williams, 490 U.S. 319,

330 n.9, 109 S. Ct. 1827, 1834 n.9 (1989) (("[T]he liberal pleading standard of Haines applies only to a plaintiff's factual allegations.").

II. Res Judicata

Tonn argues that each of his previous Complaints has been dismissed on "legal technicalities" and, therefore, he is not precluded from re-litigating them in the instant case. With regard to the most recent dismissal of his claims, in Tonn III, Tonn contends that the district court's Memorandum Opinion and Order "contained clearly contradictory statements and opinion" and that the Court erred in concluding that the doctrine of sovereign immunity barred his claims. (See Pl.'s Opp'n Mem. at 10-12.) Tonn did not appeal the district court's decision because, according to him, he was working with the IRS in an attempt to resolve the dispute outside of court. (See id, at 2, 10-13.)

"[A] ruling granting a motion to dismiss for lack of subject matter jurisdiction is not on the merits; its res judicata effect is limited to the question of jurisdiction." Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987) (citing Baldwin v. Iowa State

Traveling Men's Ass'n, 283 U.S. 522, 51 S. Ct. 517 (1931)). Because the court in Tonn III concluded that it lacked subject matter jurisdiction over Tonn's claims (due to the doctrine of sovereign immunity), it did not reach the merits of his claims and dismissed each of them without prejudice. Although Tonn interprets this dismissal without prejudice as a license for this Court to review the legal conclusions of the district court in Tonn III, the doctrine of res judicata precludes such review. "A final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it." Willy v. Coastal Corp., 503 U.S. 131, 137, 112 S. Ct. 1076, 1080 (1992). Tonn has not argued that any new basis for subject matter jurisdiction exists in the instant case that was not present in Tonn III, but instead argues that the district court's legal conclusions in Tonn III were in error. Cf. Murrell v. United States, No. 97-1730-Civ-T-17(C), 1998 WL 173191, at *1 (M.D. Fla. Apr. 6, 1998) (where the defendant conceded that the jurisdiction basis underlying the plaintiff's claim had changed, prior orders dismissing plaintiff's

claims for lack of subject matter jurisdiction did not have res judicata effect because the issue had not been decided), aff'd, 172 F.3d 882 (11th Cir. 1999).

In 1963, the United States Supreme Court restated the doctrine of jurisdictional finality and reiterated the importance of the rule that an issue finally decided by a court may not simply be re-litigated by the losing party before another court: "One trial of an issue is enough. The principals of res judicata apply to questions of jurisdiction as well as to other issues, as well as to jurisdiction of the subject matter as of the parties." Durfee v. Duke, 375 U.S. 106, 113, 84 S. Ct. 242, 246 (1963) (citations and internal quotation marks omitted). The Supreme Court's admonition applies equally to the instant case; if Tonn believed that the district court in Tonn III had erred, the appropriate forum to correct that error was the Eighth Circuit Court of Appeals. Regardless of his reasons for failing to appeal the district court's order to the Eighth Circuit, the Court is without power to review the conclusions of the court in Tonn III.[1]

Conclusion

For the foregoing reasons, and based upon all of the files, records and proceedings herein, **IT IS ORDERED** that the Defendant's Motion to Dismiss, or in the Alternative for Summary of Judgment (Doc. No. 3) is **GRANTED**, the Plaintiff's Motion for Summary Judgment in Favor of the Plaintiff (Doc. No. 9) is **DENIED**, and the Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

June 28, 1999

RICHARD H. KYLE
United States District Judge

---

[1] As discussed above, the Court need not address the merits of Tonn III. However, in the Court's opinion, each of the legal conclusions reached by the court in Tonn III was sound, and Tonn has raised no meritorious arguments that would justify a different conclusion.

APPENDIX

Section 7426 of Title 26 USCA

Pages A-16 - A-19

Sec. 7426. Civil actions by persons other than taxpayers

- (a) Actions permitted
  - (1) Wrongful levy
    If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.
  - (2) Surplus proceed
    If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.
  - (3) Substituted sale proceeds
    If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

- (b) Adjudication
  The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:
  - (1) Injunction
    If a levy or sale would irreparably injure rights in

property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

- (2) Recovery of property
  If the court determines that such property has been wrongfully levied upon, the court may -
  - (A) order the return of specific property if the United States is in possession of such property;
  - (B) grant a judgment for the amount of money levied upon; or
  - (C) if such property was sold, grant a judgment for an amount not exceeding the greater of -
    - (i) the amount received by the United States from the sale of such property, or
    - (ii) the fair market value of such property immediately before the levy.
      For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.
- (3) Surplus proceeds
  If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court

may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

- (4) Substituted sale proceeds
  If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

- (c) Validity of assessment
  For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

- (d) Limitation of rights of action
  No action may be maintained against any officer or employee of the United States (or former officer or employee) or his personal representative with respect to any acts for which an action could be maintained under this section.

- (e) Substitution of United States as party
  If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such an officer or employee as of the time such action was commenced upon proper service of process on the United States.

- (f) Provision inapplicable

The provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for a refund) shall not apply to actions under this section.

- (g) Interest
  Interest shall be allowed at the overpayment rate established under section 6621 -
  - (1) In the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary receives the money wrongfully levied upon to the date of payment of such judgment; and
  - (2) in the case of a judgment pursuant to subsection (b)(2)(C), from the date of the sale of property wrongfully levied upon to the date of payment of such judgment.
- (h) Cross reference
  For period of limitation, see section 6532(c).